S.B. Civil Misc. Appeal No.643/2002
Hajari
vs
Ram Prasad & Ors.

DATE OF ORDER : - 26.8.2005

HON'BLE MR. PRAKASH TATIA,J.

Mr.Suresh Shirmali, for the appellant.
Mr. NK Joshi, for the respondents

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Heard learned counsel for the parties.

It appears that in a suit for declaration with respect to the immovable property, the trial court dismissed the suit of the plaintiffs, against which, an appeal was preferred by the plaintiffs. The plaintiff's appeal was dismissed by the first appellate court on 15th Sept., 1999 in default. The appellant submitted application under Order 41 Rule 19 CPC stating therein that appellant's counsel could not appear on the day when the case was called and the appellant also was sick, therefore, he also could not appear. The first appellate court dismissed the said application of the appellant-plaintiff by order dated 15th Sept., 2001. Against which, this appeal has been preferred by the appellant.

It appears from the facts mentioned in the order itself that the court below should have taken a liberal approach looking to the facts of

the case in restoring the appeal as the matter was at appellate stage where the presence of advocate only was more necessary then the presence of the appellant himself. Admittedly, the appellant's counsel did not appear when the appeal was called for hearing and in the facts of this case his absence has been explained.

In view of the above, this appeal deserves to be allowed, hence, allowed and the order of the court below dated 15th Sept., 201 is set aside. The appellant's application filed under Order 41 Rule 19 CPC is allowed on payment of cost of Rs.3,000/-. Both the parties are directed to appear before the first appellate court on 20th Sept., 2005.

(Prakash Tatia), J.

c.p.goyal/-